

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Leon Percy Lawson Z-769 321

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2212

Leon Percy Lawson

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 17 August 1979, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for six months outright, plus a further suspension for six months on twelve months probation, upon finding him guilty of misconduct. The specification alleged that while serving as Ordinary Seaman on board SS AMERICAN LIBERTY under authority of the document above captioned, on or about 29 March 1979, Appellant did wrongfully assault and batter a member of the crew, Luis A. Lopez, Z-819 077. The lesser included offense of wrongfully engaging in mutual combat with a member of the crew was found proved.

The hearing was held at New York, after a change of venue from Savannah, Georgia, on 4, 6, and 25 April 1979.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of two witnesses and four exhibits.

In defense, Appellant offered in evidence his own testimony and two exhibits.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the lesser included charge had been proved. He then entered an order suspending all documents issued to Appellant for a period of six months plus a further suspension of six months on twelve months probation.

The entire decision was served on 4 September 1979. Appeal was timely filed on 10 September 1979 and perfected on 4 December 1979.

FINDINGS OF FACT

On 29 March 1979, Appellant was serving as Ordinary Seaman on board SS AMERICAN LIBERTY and acting under authority of his document while the vessel was in transit of the Panama Canal.

On 28 March 1979, Appellant became engaged in an altercation with a fellow crewmember, Luis A. O. Lopez, Z-819077. This occurred at breakfast when Lopez, a messman, was slow in serving Appellant. They exchanged mutual obscenities but not blows. Appellant threatened to see Lopez when the vessel reached New York. Thereafter, when Appellant returned a used coffee cup, Lopez made a show of banging around a large butcher knife in the pantry. Appellant lodged a complaint with the Chief Steward founded on Lopez' conduct.

The following morning, while LIBERTY was approaching Gatun Locks, Lopez was preparing the messroom for the noon meal. Appellant entered the adjacent recreation room at about 1100 to "stand by" a telephone located there. Shortly thereafter Appellant told Lopez, through the connecting doorway, "don't forget, I am going to get you in New York" or similar words. Thereafter, Lopez approached Appellant, bearing a butcher knife, cursed Appellant, and asked what he was going to do about it.

Appellant caught the attention of the Boatswain H.J. Ellison, who was on deck adjacent to the recreation room, by rapping on a window pane. In the time it took Ellison to reach the recreation room Lopez had secreted the knife and it was no longer in evidence.

Appellant met Ellison at the door to the recreation room and told him that Lopez had threatened him with a knife. Lopez denied the charge and approached the other two men, demonstrating that he had no knife in his hands or on his person.

Appellant and Lopez thereupon fell into a shoving match until directed to desist by the Boatswain. Appellant then invited Lopez out onto the deck to settle the matter. Lopez responded that he was not afraid of Appellant and followed the latter out into the adjacent passageway. The Boatswain went to the phone to contact the Chief Officer. Meanwhile the pugilists had set to, exchanging blows until Lopez fell on his back to the deck. Appellant left him lying there and walked back to the door to the recreation room.

The Chief Engineer, Kenneth F. Glenn, was in the pantry at this time, supervising some work. Appellant entered the pantry and addressed the Chief to the effect "we got to get rid of these long knives in here." When the Chief enquired as to the meaning of the remark, Appellant stated that Lopez had attacked him with a knife.

The Chief Engineer went to the cross passageway and observed Lopez, on the deck bleeding. At about 1103 the Chief reported the matter to the Master.

As a result of the incident, Lopez sustained cuts both above and below his left eye, as well as abrasions and discolorations of the face and forehead. He was removed from the vessel and required sutures as well as two days of in-patient care.

Appellant sustained a swollen and discolored finger on his right hand, which he stated resulted from the fight.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. In essence Appellant urges that the Administrative Law Judge erred in his assignment of credibility and weight to the evidence adduced.

APPEARANCE: Semel, Patrusky & Buchsbaum of New York, by Abraham A. Sam, Esq.; Alan H. Buchsbaum, Esq., on brief.

OPINION

It is well settled, both in Administrative Law generally and in R.S. 4450 proceedings that the credibility of witnesses and the weight to be assigned evidence adduced are matters within the sound discretion of the Administrative Law Judge. Only a showing that the judgment in a given case was arbitrary or capricious can found a rejection of the determinations made by the trier of fact. Decision on Appeal Nos. 2052 and 2003. Resolving inconsistencies in the evidence and determining the veracity of witness are clearly subject to the same strictures. Kilquist v. U.S., 191 F.2d 69 (2nd Cir. 1951); N.L.R.B. v. Universal Camera Corp., 179 F.2d 749 (2nd Cir. 1950). See also Decisions on Appeal Nos. 1888 and 1911.

The evidence of record is clearly sufficient to support the conclusion that Appellant and Lopez engaged in mutual combat. The history of the two days at issue, recounted by all the witnesses, establishes the existence of some animosity between these two crewmen. Though threats of several sorts were exchanged, the crux of the matter is the fact that both men freely entered the passageway adjacent to the recreation room, only shortly after having been ordered by the Boatswain to cease scuffling. Fistcuffs ensued - no matter who landed the initial blow.

In arriving at these operative facts, the Administrative Law Judge clearly bore in mind the self-serving nature of statements given by Lopez and by Appellant. In the resolution of the

inconsistencies which arose, the testimony of the others - both before the Administrative Law Judge and contained in LIBERTY's log - were judiciously weighed to reach the ultimate decision. The Administrative Law Judge accepted, as do I, Appellant's claim that he was threatened with a knife, and that he did not kick Lopez at the conclusion of their fight. The issues of the threat against Lopez at the conclusion of their fight. The issues of the threat against Lopez on 28 March, and the several slaps allegedly administered by Lopez on 29 March were not resolved in Appellant's favor. On the first issue, the demeanor and credibility of the Boatswain clearly carried conviction. On the latter point, the independent recollection of the deck delegate, Pedro PIZARRO, was both credible and non-aligned. There is no impropriety in finding some, but not all, of a witness's testimony worthy of belief. Elevert v. U.S., 231 F.2d 928 (1956).

The sum of the evidence supports the mutuality of combat and denudes the claim of self-defense of any dignity whatsoever. Thus the consideration of Appellant's extensive prior record was correct and I find no disparity in the suspension imposed.

CONCLUSION

The decision of the Administrative Law Judge is well founded in law and fact, substantial evidence of a reliable and probative character supporting the finding of guilty of the offense of engaging in mutual combat, a lesser included offense of assault and battery.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 17 August 1979, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 23rd day of May 1980.

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Evidence

Credibility and weight a question for ALJ